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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION
AND NATURALIZATION SERVICE, *et al.*,
Petitioners,
v.
HAITIAN CENTERS COUNCIL, INC., *et al.*,
Respondents.

On Writ Of Certiorari To The United States
Court of Appeals For The Second Circuit

BRIEF OF FEDERATION FOR AMERICAN
IMMIGRATION REFORM, AMICUS CURIAE,
SUPPORTING REVERSAL

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**BRIEF OF FEDERATION FOR AMERICAN
IMMIGRATION REFORM, AMICUS CURIAE,
SUPPORTING REVERSAL**

The Federation for American Immigration Reform (FAIR), as an amicus curiae, urges this Court to reverse the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTEREST OF AMICUS CURIAE

FAIR is a nonprofit corporation that is recognized by the Internal Revenue Service as a tax-exempt charitable and educational organization. Since its

founding in 1978, FAIR has been studying the environmental, economic, and social impact of legal and illegal immigration into the United States. FAIR disseminates the results of its studies and other information on national immigration policy to its members, educational institutions, and policymakers through newsletters, reports, and testimony to Congress.¹

FAIR is guided in its work by a National Board of Advisors, many of whom have academic or professional expertise on the subject of immigration. Alan C. Nelson, a member of the National Board of Advisors, was Commissioner of the Immigration and Naturalization Service from 1981 to 1989. He is familiar with the origins of the Haitian interdiction program and has contributed to this brief as co-counsel.

FAIR urges that the judgment of the Second Circuit in this case be reversed. FAIR supports the reasoning of the Government petitioners on the legal issues raised in their petition for a writ of certiorari and does not repeat their arguments in this brief. Instead, this brief brings to this Court's attention two additional matters that are relevant to this case: (1) an informed statement of the immigration policy context of the Haitian interdiction program, including the findings of a FAIR task force to Haiti on the extent of political persecution in that country, and (2) an argument that the respondents have no standing to challenge actions of the U.S. Government to stop unlawful attempts by aliens to enter the United States.

¹ FAIR has approximately 50,000 members, including 4,100 in Florida, where many illegal immigrants from Haiti have attempted to settle.

STATEMENT OF THE CASE

FAIR relies on the petitioners' Statement of the Case and highlights here only those aspects of the case history relevant to the argument in this brief.

In 1980 thousands of illegal immigrants from Cuba and Haiti began arriving on the Florida coast by boat. For the most part the Cubans did not have access to boats in their own country and were transported in boats owned by U.S. residents. The U.S. Government brought the Cuban "boatlift" to an end by taking action against the boat owners, including seizure of the boats. The Haitians, in contrast to the Cubans, arrived mostly in Haitian-owned boats, which they abandoned on arrival. Seizure of boats would not have impeded the illegal influx of Haitians. Instead, in 1981 the Coast Guard commenced a program of interdicting boats thought to be carrying illegal Haitian immigrants. Because many of the boats were not seaworthy, the Haitians were removed from the boats and returned to Haiti. The Haitian interdiction program has significantly reduced the number of Haitians attempting to enter the United States illegally by boat.

The Haitian interdiction program has always been accompanied by procedures that permit Haitians who fear persecution by their government to seek admission to the United States. Initially, claims of persecution by interdicted Haitians were heard aboard Coast Guard vessels. When a district court order temporarily suspended repatriation of any Haitians after the 1991 coup d'etat in Haiti, the hearing of persecution claims was shifted to the Guantanamo Bay Naval Base, where Haitian interdictees were held

pending the resumption of repatriation. After repatriations were resumed, the U.S. Government established facilities in the Haitian capital of Port-au-Prince to accept and process claims for admission to the United States on the basis of persecution.

Organizations in the United States that disapprove of the interdiction program have challenged its legality in three Circuits. The initial challenge by the Haitian Refugee Center was defeated when the District of Columbia Circuit held that the Center's interest in associating with Haitians seeking to immigrate illegally to the United States did not establish standing to challenge the interdiction program. *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 800-07 (D.C. Cir. 1987). Although the Haitian Refugee Center joined individual Haitian plaintiffs to its subsequent challenge in the Eleventh Circuit, the Eleventh Circuit held that the individual Haitian plaintiffs, being aliens outside the United States, also had no right of judicial review. *Haitian Refugee Center v. Baker*, 953 F.2d 1498, 1505-07 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992). In the latest challenge, filed in the Second Circuit, the Haitian Centers Council has replaced the Haitian Refugee Center as the organizational plaintiff and different Haitian nationals are named as individual plaintiffs. The Second Circuit found that the individual Haitian plaintiffs did have standing and instructed the district court to issue an order that forbids the petitioners from repatriating any interdicted Haitian who is threatened with persecution. The order does not specify how the petitioners are to know which of thousands of Haitian interdictees would be so threatened. The order was stayed by this Court and is under review here.

In the Second Circuit litigation, the courts below have made observations about the political situation in Haiti that seem to go beyond the specific findings of fact.² Federal courts do, of course, routinely take cognizance of "all matters of general knowledge". *Muller v. Oregon*, 208 U.S. 412, 421 (1908). Such matters form the context in which specific findings of fact are interpreted. However, the contextual assumptions that seem to have informed the decisions below in this case are not consistent with FAIR's own on-site findings regarding the political situation in Haiti. Also, the decisions below did not expressly consider the national immigration policies that are the context in which the Haitian interdiction program was established and operates. Those policies, while sometimes contrary to the interests of individual Haitians, serve many important national interests, as well as the interests of refugees and immigrants from countries other than Haiti. To bring these contextual matters to the attention of this Court, the argument in this brief is preceded by a Statement of Context that outlines the interests served by national immigration policy and summarizes the findings of a FAIR task force to Haiti.³

² For example, the district court stated that repatriation of Haitians would be returning them "to the jaws of political persecution, terror, death, and uncertainty". See Pet. App. at 167a. The respondents made comparable statements about Haiti in their opposition to the Government's petition, including statements that "political violence in Haiti" has "spiraled to unprecedented levels" and that the interdiction program has encircled Haiti with a "Floating Berlin Wall" that "bars refugees from escaping persecution and death". Resp. Opp. to Cert. at 2, 8.

³ This Court has found contextual information furnished by

STATEMENT OF CONTEXT

The Immigration and Nationality Act (INA) provides for the admission of 675,000 immigrants per year, not counting refugees.⁴ Approximately 90 percent of those immigrants come from developing countries in Asia and Latin America, with more admissions from Haiti than from almost any other country.⁵ Most of those admitted are relatives of other recent immigrants.⁶

Immigration to the United States, one of the few countries in the world that admits immigrants, cannot provide relief from poverty or oppression to more than a tiny fraction of the world's rapidly growing population. In 1990 world population was approximately 5.3 billion and was growing at the rate of approximately one billion persons per decade.⁷ Ninety percent of this growth was occurring in developing

amici curiae to be useful in cases that have broad public policy implications. See, e.g., *Regents of the University of California v. Bakke*, 438 U.S. 265, 316-17, 321-24 (1978) (admission policies of universities); *Roe v. Wade*, 410 U.S. 113, 148-52 (1973) (medical data on early pregnancy); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 56-57 n.111 (1973) (practical consequences of nullifying state taxing system).

⁴ 8 U.S.C. § 1151(c)-(e) (Supp. III 1991).

⁵ 8 U.S.C. § 1151(b) (1988). In 1988 only Korea, Mexico, and the Philippines provided more immigrants than Haiti. Immigration and Naturalization Service, *1990 Statistical Yearbook of the Immigration and Naturalization Service* 52-53 (Dec. 1991) [hereinafter *1990 INS Yearbook*].

⁶ *1990 INS Yearbook*, *supra* note 5, at 54-57.

⁷ Source: Population Division, United Nations, cited in Robert W. Fox & Ira H. Mehlman, *Crowding out the Future* 50-51 (1992).

countries.⁸ The time in human history when large-scale migrations were a viable solution to economic and social problems has come to an end.

Congress imposes statutory ceilings on immigration admissions based on this country's capacity to absorb immigrants.⁹ However, many aliens who are excluded by these ceilings attempt to immigrate illegally. Some enter the United States legally, as tourists or students, and fail to return home when their visas expire. Others enter surreptitiously, by land or by sea. In 1990, the Immigration and Naturalization Service ("INS") apprehended more than a million aliens attempting to enter the United States without visas.¹⁰ Although a majority of illegal immigrants come from countries that are proximate to the United States, such as Mexico and Haiti, a large number come from elsewhere. For example, the Coast Guard and the INS are intercepting a growing number of ships carrying Chinese nationals who have been recruited to work in illegal "sweatshops".¹¹

⁸ *Id.*

⁹ See, e.g., S. Rep. No. 55, 101st Cong., 1st Sess. at 10-11 (1989).

¹⁰ *1990 INS Yearbook*, *supra* note 5, at 166.

¹¹ In the past year freighters and "fishing boats", each containing more than 100 illegal immigrants from China, were intercepted by the Coast Guard or INS in the harbors of Los Angeles and Honolulu and off the Atlantic and Pacific coasts. See Lena H. Sun, *Smuggling of People, Goods Is Big Business in China*, The Washington Post, Sept. 5, 1992, at A1; David Perlmutter, *Chinese Aliens to Face Judge in Texas - Refugees Found On Taiwanese Freighter in Good Spirits*, The Charlotte Observer, Sept. 11, 1992, at 4C; Berkely Hudson & Greg Krikorian, *160 Rescued From Sinking Fishing Boat*, The Los Angeles Times, Sept. 13, 1992, at B1.

Large-scale illegal immigration can have adverse effects on the well being of American citizens and the large number of immigrants already living here. Maintaining air and water quality and disposing of hazardous and other wastes have become increasingly problematic in the urban areas where most immigrants settle as the size and density of their populations have increased.¹² Labor economists have identified the influx of millions of alien workers into central city and agricultural labor markets during the past 25 years as a key factor in the stagnation or decline of wages in those markets.¹³ The increased tendency for illegal alien workers to be accompanied or joined by their families, who often are dependent upon state hospitals and other public welfare services, has imposed a growing fiscal burden on the localities where they reside.¹⁴

¹² Based on U.S. Census Bureau figures, the population density of the New England and the New York coastal region now exceeds that of El Salvador and Haiti, the two most densely populated countries in the Western Hemisphere. Fox & Mehlman, *supra*, at 38-39.

¹³ Vernon M. Briggs, Jr., *Mass Immigration and the National Interest* 185-223 (1992); George J. Borjas, *Friends or Strangers - The Impact of Immigrants on the U.S. Economy* 97-114 (1990).

¹⁴ The annual cost to San Diego County of providing services to 200,000 undocumented aliens exceeds the local taxes they pay by \$146 million. See Auditor General of California, *A Fiscal Impact Analysis of Undocumented Immigrants Residing in San Diego County* (Aug. 1992). The costs to Los Angeles County in 1991 of providing public services to 950,000 illegal alien family members, net of federal and state aid and taxes collected from illegal alien households, was \$500 million. See County of Los Angeles, *Impact of Undocumented Persons and Other Immigrants on Costs, Revenues and Services in Los Angeles County* ("Final Draft") (Oct. 14, 1992).

Some immigrants come to this country to escape political or religious persecution. The INA contains special provisions for aliens who are unable or unwilling to return to their own countries because of a "well-founded fear of persecution".¹⁵ If they are present in the United States or at a port of entry, they may apply for "asylum", a status that allows them to remain in the United States indefinitely.¹⁶ The filing of asylum applications has increased in recent years. In no year prior to 1980 did the number of applications exceed 6,000.¹⁷ By 1989 asylum applications exceeded 100,000 per year.¹⁸

The multiplication of asylum applications has put great pressure on the adjudication facilities of the INS. Because asylum applicants are within the United States, they have rights of administrative appeal and judicial review that can be used to extend the adjudication process for years. Because the objective of most immigration litigation is to keep the alien in the United States as long as possible, dilatory tactics are common.¹⁹ Many illegal aliens who file asylum applications after being apprehended fail to appear at their

¹⁵ 8 U.S.C. §§ 1101(a)(42), 1157-59 (1988).

¹⁶ 8 U.S.C. § 1158 (1988).

¹⁷ 1990 *INS Yearbook*, *supra* note 5, at 105.

¹⁸ *Id.*

¹⁹ See, e.g., *Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2d Cir. 1976) (referring to "the practice, all too frequently adopted by aliens once they become subject to a deportation order, of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall their departure from the country as long as possible"), *cert. denied*, 434 U.S. 819 (1977); *Acevedo v. INS*, 538 F.2d 918 (2d Cir. 1976); *Fan Wan Keung v. INS*, 434 F.2d 301 (2d Cir. 1970).

hearings.²⁰ Their chances of remaining indefinitely in the country as illegal immigrants are good because the costs of finding and deporting an alien who is inside the country are very high.²¹

Aliens who are outside the United States and have a "well-founded fear of persecution" may be admitted to the United States as "refugees" under the Refugee Act of 1980.²² The purpose of the Refugee Act was to replace the "piecemeal approach of our Government reacting to individual refugee crises" with a "permanent and systematic procedure for the admission to this country of refugees".²³ The Refugee Act contemplates the admission of up to 50,000 refugees per year. 8 U.S.C. § 1157 (1988). The determination of which refugees will be admitted, and whether the normal ceiling of 50,000 will be exceeded, is made by the President in consultation with Congress. *Id.* In every year since the Refugee Act was enacted, refugee admissions have exceeded the 50,000 ceiling.²⁴ 132,000 refugee admissions are authorized for the current fiscal year.²⁵

According to the United Nations High Commissioner on Refugees, there are between 15 and 17

²⁰ 1990 *INS Yearbook*, *supra* note 5, at 105 (Table 29: NOTE).

²¹ While the illegal immigrant population in the United States is estimated to be in the millions, the INS succeeded in deporting only 25,228 aliens in 1990, the last year for which statistics are published. 1990 *INS Yearbook*, *supra* note 5, at 166.

²² Pub. L. No. 96-212, 94 Stat. 102 (1980).

²³ S. Rep. No. 256, 96th Cong., 1st Sess. 3 (1979).

²⁴ 1990 *INS Yearbook*, *supra* note 5, at 103 (Table 26).

²⁵ Presidential Determination 93-1, 57 Fed. Reg. 47,253 (Oct. 15, 1992).

million refugees who have fled their countries and cannot return.²⁶ Uncountable millions of people threatened by persecution remain in their native countries because they cannot leave. Even if U.S. refugee admissions were a large multiple of current levels, only a minute fraction of the world's persecuted people would be accommodated.

Aliens generally do not qualify for admission to the United States as refugees unless they are outside their native countries. 8 U.S.C. § 1101(a)(42) (1988). The President, however, may specify exceptions, and has done so for Cuba, Haiti, El Salvador, Guatemala, Vietnam, and the former Soviet Union.²⁷ Consequently, Haiti is one of the few countries in which an alien who fears persecution may apply for admission to the United States as a refugee without having fled his own country.

Haitians who reach the United States as illegal immigrants are able to bypass the refugee program for aliens outside the United States and gain access to the asylum program for aliens within the United States. The advantages of bypassing the refugee program are that (1) refugee admissions are numerically limited, while asylum approvals are not; (2) refugee admission decisions are not subject to judicial review, while asylum adjudications are; (3) most refugees are not admitted until a U.S. organization agrees to sponsor their resettlement; and (4) refugee applicants who

²⁶ Al Kamen, *Cold War Consensus on Refugee Aid Ebbing Despite Relentless Need*, *The Washington Post*, July 20, 1992, at A8.

²⁷ 8 U.S.C. § 1101(a)(42) (1988); Presidential Determination 93-1, *supra* note 25, at 47,254.

are denied admission remain outside the United States, while unsuccessful asylum applicants, being already within the United States, can often remain here by avoiding apprehension and deportation. In effect, Haitians who manage to reach the United States by illegal means gain significant advantages over those who do not.

Although the U.S. Government has no legal obligation to provide asylum hearings to aliens who are stopped outside the United States while attempting to enter this country illegally, the Government had been doing so for interdicted Haitians until the courts below intervened in the conduct of the interdiction program. Therefore, when the Government shifted asylum processing from the Guantanamo Bay Naval Base to Port-au-Prince in Haiti, FAIR sent a three-person task force to Haiti to study the economic and political situation in that country so that FAIR could take a position on this policy based on first-hand knowledge of the situation in Haiti.

During the week of June 15-19, 1992, the FAIR task force conducted extensive interviews with human rights organizations, representatives of international and private volunteer organizations, Haitian scholars and intellectuals, high level U.S. Embassy personnel, and repatriated Haitians. The task force learned that 20 years of deforestation and soil erosion in Haiti had produced an economic crisis for the rural population, causing migration from the countryside into the capital city of Port-au-Prince, where public services and economic opportunities were inadequate to meet the needs of the burgeoning urban population. This economic deterioration was exacerbated by the O.A.S. embargo that followed the 1991 coup.

The FAIR task force found no evidence of systematic persecution or intimidation of political opponents by the national government of Haiti. On the contrary, the task force spoke with many opponents of the current regime, none of whom showed any fear of expressing their views in public. The absence of systematic persecution applied equally to repatriated Haitians. The task force did find that some parts of Haiti were less safe than others because of intimidation or harassment by local officials or police acting on their own. The task force found no evidence that Haitians who entered the U.S. Embassy to file asylum applications were subject to interference or retribution by the government. Access to the Embassy by Haitian nationals was unimpeded and generally unmonitored by the Haitian government. Also, Haitians were allowed to submit applications at sites other than the Embassy. For the convenience of this Court and the parties, the report of the FAIR task force is attached as an Appendix to this brief.

The report of the FAIR task force is consistent with the position of the petitioners that political persecution is not so widespread in Haiti as to justify a presumption that more than a small number of those seeking to enter the United States illegally are fleeing persecution. Instead, the overwhelming majority are "economic migrants", seeking to escape the economic troubles of their native country.

SUMMARY OF ARGUMENT

The extraterritorial application of 8 U.S.C. § 1253(h) need not be decided by this Court because the respondents have no standing to seek its enforcement

by the federal courts. Two arguments sustain this conclusion.

I. A uniform body of decisional law, endorsed by this Court, has denied to aliens outside the United States judicial review of the Government's administration of the immigration laws absent an explicit statutory grant of the right to judicial review, and no such grant exists in this case. Since mass illegal migration from Haiti became a serious national problem in 1980, every change in the Government's program to stop Haitians from attempting to reach the United States in boats has been an opportunity for a new court challenge, and every court decision has become subject to reconsideration by structuring a new class of Haitians whose interests are allegedly injured. The history of this case proves the wisdom of this Court's long-standing injunction against judicial interference in the administration of the immigration laws at the behest of aliens outside the country.

II. Even under the basic Constitutional criteria, the respondents lack standing to challenge their repatriation under the Government's interdiction program. The Haitians are interdicted only because they are breaking U.S. laws. They are repatriated only because leaving them in unseaworthy boats would endanger their lives. Illegal immigrants from any country have no "legally protected interest" in burdening an immigration law enforcement program with court-ordered measures to convert it into an asylum program. Haitians who fear persecution by their government may apply in Haiti for admission to the United States under the refugee program enacted by Congress. If any repatriated Haitians are persecuted because they

cannot migrate to the United States, their injury is "traceable" to their failure to qualify under the statutory refugee program, not to the actions of the Coast Guard to stop their illegal entry into the United States in the manner that least endangers their lives. Determinations under the refugee program are not reviewable, and an alien should not be permitted to obtain review by violating U.S. immigration laws.

ARGUMENT

The legal premises of the Second Circuit's judgment are that (1) 8 U.S.C. § 1253(h) is a restriction on the President's authority to stop aliens from attempting to enter the country illegally and (2) the federal courts have jurisdiction to enforce this restriction in suits filed by aliens who are outside the United States.

The Government's petition argues persuasively why 8 U.S.C. § 1253(h) has no extraterritorial application and why the respondents' challenge to the interdiction program was precluded by collateral estoppel. However, if this Court were to reverse the Second Circuit's judgment solely on the basis of an interpretation of 8 U.S.C. § 1253(h) or an application of collateral estoppel, challenges to the Government's efforts to stop mass illegal migration from Haiti are likely to be reinstituted, possibly with a redesigned class of Haitian plaintiffs, based on other statutory or constitutional rights that allegedly are being violated. To foreclose such challenges and free the Executive Branch of district court micromanagement of national immigration policy, this Court should address the original defect in this litigation, which is that the challenge to the Haitian interdiction program, having

now progressed through three Circuits, should not have been heard in the first place.

The respondents whose "injuries" were to be relieved by the district court order were Haitian nationals who had been or might in the future be interdicted by the Coast Guard as they engaged in unlawful attempts to enter the United States.²⁸ These respondents had no standing to challenge any aspect of the interdiction program. First, as aliens outside the United States, they have no standing to challenge the administration or enforcement of U.S. immigration laws under the jurisdictional precedents that apply to immigration cases. Second, their status as aliens attempting to enter the United States illegally precludes satisfaction of the basic Constitutional requirements of injury to a "legally protected interest" and "traceability" of the alleged injury to the challenged Government action.²⁹

I. As aliens outside the United States, the Haitian respondents lack standing to challenge the Government's administration and enforcement of U.S. immigration laws.

The question of whether, and to what extent, 8 U.S.C. § 1253(h) ties the President's hands in preventing mass illegal migration is a question that should not be decided by a federal court. That is the

²⁸ *Haitian Centers Council v. McNary*, 969 F.2d 1350, 1354-55 (2d Cir. 1992).

²⁹ The standing issue was not raised as such in the petition for writ of certiorari, but that does not prevent this Court from addressing this or any other jurisdictional impediment to the suit. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546-47 (1986); *Juidice v. Vail*, 430 U.S. 327, 331 (1977).

clear implication of a century of jurisprudence on the law of immigration. In *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), this Court observed that the power to exclude aliens from the United States was a "fundamental act of sovereignty" that inhered in both the legislative and the executive branches. Accordingly, judicial intervention in the enactment and administration of immigration laws occurs only when it is "authorized by treaty or by statute, or is required by the paramount law of the Constitution". *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101-02 n.21 (1976).

Because aliens outside the United States acquire Constitutional protection only when they come within the territory of the United States, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71, *reh'g denied*, 494 U.S. 1092 (1990), judicial intervention at the behest of aliens outside the United States can be based only on statute, *Kleindienst v. Mandel*, 408 U.S. 753 (1972). "Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, *unless expressly authorized by law*, to review the determination of the political branch of the Government to exclude a given alien." *Knauff v. Shaughnessy*, *supra*, at 543 (emphasis added). Among the compelling reasons for judicial restraint is that it would open the federal courts to claims from a practically limitless number of claimants. *Lem Moon Sing v. United States*, 158 U.S. 538, 541-42 (1895).

Following this Court's guidance, the federal courts have, with considerable consistency and uniformity, refused to entertain challenges to the administration of immigration laws by aliens who were outside the

United States. The right of judicial review has been denied whether the challenge was premised on refugee status, employment status, or having a relative in the United States. See *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990) (denied review of visitor admission decision); *Centeno v. Shultz*, 817 F.2d 1212 (5th Cir. 1987) (denied review of visitor eligibility), *cert. denied*, 484 U.S. 1005 (1988); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970 (9th Cir. 1986) (denied review of employment eligibility); *Te Kuei Liu v. INS*, 645 F.2d 279 (5th Cir. 1981) (denied petition to reopen deportation proceeding); *Ventura-Escamilla v. INS*, 647 F.2d 28 (9th Cir. 1981) (denied review of special immigrant status classification); *Wan Shih Hsieh v. Kiley*, 569 F.2d 1179 (2d Cir.) (denied review of request to compel INS to complete investigation of marriage validity), *cert. denied*, 439 U.S. 828 (1978); *Rivera de Gomez v. Kissinger*, 534 F.2d 518 (2d Cir. 1976) (denied review of immigrant eligibility); *Cobb v. Murrell*, 386 F.2d 947 (5th Cir. 1967) (denied review of employment eligibility); *Braude v. Wirtz*, 350 F.2d 702 (9th Cir. 1965) (denied review of employment eligibility); *United States v. Phelps*, 22 F.2d 288 (2d Cir. 1927) (denied review of challenge to immigration regulations), *cert. denied*, 276 U.S. 630 (1928). The alien plaintiff's lack of standing is not cured by including a U.S.-based relative or organization as co-plaintiff. *Centeno v. Shultz*, *supra* (co-plaintiff U.S. relatives); *Chinese American Civic Council v. Attorney General*, 396 F. Supp. 1250 (D.D.C. 1975), *aff'd on other grounds*, 566 F.2d 321 (D.C. Cir. 1977) (co-plaintiff U.S. organization); *Braude v. Wirtz*, *supra* (co-plaintiff U.S. employers).³⁰

³⁰ The respondents refer to this line of jurisprudence as "anom-

The respondents make two arguments in opposition to this long line of Supreme Court and lower court precedents: (1) the decisions really did not depend on the location of the alien but upon the nature of the visa issuance process, and (2) the case law originated prior to the Administrative Procedure Act (APA) and has therefore lost its vitality outside of narrow areas where preclusion of judicial review is codified.³¹ Both arguments are refuted by this Court's decision in *Brownell v. Tom We Shung*, 352 U.S. 180 (1956). In *Brownell* this Court held that, under the APA, judicial review of an exclusion order was not precluded simply because the INA designated the administrative decision on the order as "final". Sixty years before, this Court had held that an administrative decision designated "final" under an immigration statute was not reviewable. *Lem Moon Sing v. United States*, 158 U.S.

alous" and state that the federal courts "have repeatedly permitted aliens located outside of the United States to obtain judicial review of immigration decisions affecting them". Resp. Opp. at 14. The respondents cite three cases in support of this statement. In two of the three cases the challenged immigration actions were orders of deportation issued while the alien was present in the United States: *Juarez v. INS*, 732 F.2d 58 (6th Cir. 1984); *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977). Cases that involve actions to expel aliens who are already in the United States have no relevance to the standing of aliens who are outside the United States. In the third case, *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979), the class that was certified for the suit did include aliens both inside and outside the United States. There, however, the court concluded that "weeding out" the nonresident numbers of the class would have been "costly and time-consuming" and would have forestalled relief for the thousands of class members who were present in the United States. *Id.* at 984. It is *Silva* that is "anomalous".

³¹ Resp. Opp. at 14-15 n.18.

538 (1895). In clarifying the change wrought by the APA to the reviewability of immigration actions, this Court also made clear what was *not* changed: "We do not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." 352 U.S. at 184 n.3.³² In addition to showing that the APA did not change the standing rule for aliens outside the United States, the Court's statement also makes clear that the location of the alien at the time of the challenged immigration action is of paramount importance.

Although the jurisdictional impediment to "actions from abroad" in immigration cases has not always been characterized as a lack of standing on the part of the alien plaintiff, that is the most apt description because the position of the plaintiff has been the decisive factor in denial of judicial review.

Although standing in no way depends upon the merits of the plaintiff's contention that particular conduct is illegal, . . . it often turns on the nature and source of the claim asserted. . . . Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.

³² As the petition notes, 5 U.S.C. § 702(1) provides the required flexibility under the APA to preserve pre-APA jurisdictional limits on "subjects inappropriate for judicial action". Pet. at 28.

Warth v. Seldin, 422 U.S. 490, 500 (1975) (citations omitted).³³

When the interdiction program was challenged in the Eleventh Circuit, the Court of Appeals correctly held that the INA provides no right of review of claims for asylum or withholding of deportation "at the behest of aliens beyond our borders". *Haitian Refugee Center v. Baker*, *supra*, 953 F.2d at 1505. When the interdiction program was again challenged in the Second Circuit, the Court of Appeals held simply that "the [screened-out Haitian] plaintiffs do have standing because . . . they are asserting a right, under § 243(h) of the INA and Article 33 of the Refugee Convention, not to be returned to Haiti". *Haitian Centers Council v. McNary*, *supra*, 969 F.2d at 1356. The Second Circuit's failure to acknowledge the force of this Court's rulings against judicial intervention, and the position of the respondents that this Court's statement in *Brownell* on alien standing is "dictum",³⁴ warrant restatement by this Court of the jurisdictional rule that should have stopped this litigation at the time it commenced.

II. As illegal immigrants, the Haitian respondents lack the "legally protected interest" and the injury "traceable" to the Government's immigration law enforcement program required to establish standing to challenge that program.

The constitutional requirements for standing are threefold: (1) "injury in fact" to a "legally protected

³³ The standing doctrine "embraces several judicially self-imposed limits on the exercise of federal jurisdiction" in addition to the Constitutional requirements. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

³⁴ Resp. Opp. at 14.

interest", (2) a "causal connection" between the injury and the challenged action ("traceability"), and (3) a likelihood that a favorable decision will address the injury ("redressability"). *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). The alleged injury to the individual Haitian respondents does not satisfy the requirements of relation to a "legally protected interest" and "traceability" of the alleged injury to the interdiction program.

Haitian nationals are interdicted at sea because their attempt to enter the United States without a visa and without proper inspection and examination are a crime.³⁵ The Government's actions to prevent this crime do not diminish any procedural or substantive immigration rights of the Haitian respondents that they would enjoy if they had not broken the law. They remain eligible for admission to the United States as refugees if they qualify under the program enacted by Congress for aliens outside the United States. Haitians who seek to bypass the refugee program by entering the country illegally have no "legally protected interest" in not being interdicted and repatriated.

In *Burrafato v. United States Department of State*, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976), the Second Circuit held that federal courts did not have jurisdiction to hear the challenge of an illegal alien to the State Department's failure to follow its own regulations in deporting him. The Second Circuit held that if the alien "were legally within the

³⁵ 8 U.S.C. § 1325(a) (1988). A first attempt constitutes a Class B misdemeanor, and each subsequent attempt constitutes a Class E felony. 18 U.S.C. § 3559(a) (1988).

United States, he might well have standing in the federal courts to require the Department of State to follow its own regulations . . . [but] . . . To give him rights due to his unlawful presence greater than those he would have had if he had not come to this country, would be the worst sort of bootstrapping and would encourage aliens to enter this country surreptitiously". 523 F.2d at 557. The same reasoning should have been applied by the Second Circuit in this case. Haitians are not entitled to judicial review of denial of admission under the normal refugee program and they should not be allowed to obtain such review as a result of their attempts to enter the country illegally.

The alleged injury to the Haitian respondents also does not satisfy the "traceability" requirement for standing. The injury claimed by the interdicted Haitians is their "return" to a country where they might be persecuted in alleged violation of 8 U.S.C. § 1253(h). Missing, however, is the required "causal link" between the claimed injury and the interdiction program. Repatriation is an integral part of the Haitian interdiction program because the boats used to smuggle the Haitians into the United States are rarely seaworthy. Most interdicted Haitians are "economic migrants" who do not face persecution when repatriated, and the officials who conduct the interdiction and repatriation program cannot distinguish between Haitians who are political refugees and those who are not.³⁶ Consequently, if the interdiction program results in the repatriation of any bona fide refugee to Haiti, that is only a collateral and unintended effect

³⁶ Resp. Opp. at 7 n.7.

of the Government's effort to stop an unlawful mass migration of Haitians in the manner that least endangers their lives. The inability of a repatriated Haitian to escape persecution in his country by entering the United States is traceable to his failure to qualify for admission under the U.S. refugee program established by Congress, not to the Government's enforcement of the immigration law's nonrefugee provisions.

In attempting to cope with mass illegal immigration from Haiti, the Government has only limited options. If the Haitians successfully challenge the repatriation option, the Government will be forced to (1) allow mass illegal entry into the United States, (2) turn away the Haitian boats and risk the drowning of their occupants, or (3) provide Haitian interdictees access to the U.S. asylum program, which by law is limited to aliens present in the United States. Aliens intent on breaking U.S. immigration laws should not be allowed the use of federal courts to force such choices upon the Government.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals for the Second Circuit in this case on the ground that the respondents lack standing to challenge the Haitian interdiction program.

Respectfully submitted,

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APPENDIX

HAITI: A STATUS REPORT ON REPATRIATION**June 26, 1992****Prepared by: Federation for American Immigration Reform****1666 Connecticut Avenue, N.W., Suite 400****Washington, D.C. 20009****Telephone: (202) 328-7004****Executive Summary**

Since the large-scale migration of Haitian boat people began in the aftermath of the September 30 coup in Haiti, the Federation for American Immigration Reform has supported the U.S. policy of interdiction at sea and the processing of asylum claims at Guantanamo, Cuba. However, when the Bush administration instituted a policy of interdiction and direct repatriation of Haitians on May 24, FAIR felt it necessary to observe first hand whether Haitians seeking political asylum in the United States were being given an opportunity to do so. In addition, we attempted to ascertain whether individuals returned to Haiti were becoming the victims of retribution at the hands of the Haitian junta.

During the week of June 15-19, three members of FAIR's senior staff conducted a fact-finding mission to Haiti. The following report is an account of the major findings of the FAIR investigation of conditions in Haiti.

1. Repatriations occur without incident. The FAIR task force observed two boat loads of Haitians being repatriated from Guantanamo. On both days, the processing of the returnees was handled routinely by civilian Haitian immigration authorities. There was a large and visible presence of Haitian and international Red Cross personnel, the U.S. Coast Guard and the U.S. Embassy. After the initial readmission to Haiti, the returnees are placed in the care of the Red Cross which assists the repatriates in getting to their home villages.

2. Guantanamo had become a magnet for economic migrants. Economic conditions in Haiti have deteriorated to a point where even the prospect of making it to the U.S. Naval Base at Guantanamo had become an incentive for migration. Without exception, all those currently being repatriated stated that they left Haiti for economic, not political reasons. With about one-third of those at Guantanamo being allowed to enter the United States, Guantanamo itself had become a magnet for still more to come.

3. "In-country" application for refugee status is possible. As of May 24, the formal U.S. policy is that any Haitian who wishes to apply for refugee status in the United States must do so in Haiti. Haitians have free and easy access to the U.S. Embassy in Port-au-Prince. Comings and goings at the embassy are not routinely monitored by Haitian authorities. Those wishing to file an application for refugee status can do so without interference or retribution from Haitian authorities. Arrangements can also be made for individuals in remote parts of the country who do not have easy access to the embassy itself. In addition, the U.S. Embassy has widely disseminated information on how to apply for refugee status. Pertinent information has been broadcast on all popular Creole language radio stations.

4. Repatriates have not been singled out for persecution. After conducting extensive interviews with dozens of repatriates and human rights monitors in Haiti, there is no evidence that those who have been returned to Haiti have been murdered, harmed or jailed. In some parts of the country, returnees have been harassed or intimidated by local authorities acting on their own. However, such harassment and intimidation by local police or militia of all citizens is widespread in many parts of the country.

5. The embargo is widely violated and is creating additional hardship for Haiti's poor. Many OAS members,

the European Community and the Japanese are refusing to honor the economic embargo. As a result, those who were behind the coup are being inconvenienced by somewhat higher prices for imported goods, while Haiti's poor are being decimated by loss of jobs and higher costs for essential goods. Most forms of humanitarian and agricultural assistance have been reduced or halted as a result of the embargo which also harms Haiti's poorest citizens.

6. Haiti has become an ecological disaster. Virtual total deforestation of Haiti has created an ecological and agricultural disaster. Soil erosion threatens the livelihood of millions of poor Haitians who survive on subsistence farming. The loss of farmland is also contributing to massive urban migration, primarily to Port-au-Prince which lacks even the basic health and sanitation facilities to cope with its current population.

I. Purpose of Visit

Between June 15-19, 1992, three senior staff members of the Federation for American Immigration Reform, Dave Ray, Cameron Whitman and Ira Mehlman, visited Haiti to make an independent assessment of conditions in that country. The objectives of the visit were to determine:

- a. general economic and political conditions in Haiti;
- b. general human rights conditions;
- c. human rights conditions of Haitian boat people who have been repatriated; and
- d. the viability of making "in-country" asylum claims.

During our week in Haiti we conducted extensive interviews with human rights organizations, representatives of international and private volunteer organizations, Haitian scholars and intellectuals, high level U.S. Embassy personnel and repatriated Haitians themselves. The objective was to get a broad cross section of opinions about the causes of the Haitian migration problem and how the United States might best cope with it. Our overriding con-

cerns, however, were to determine whether boat people our government has returned to Haiti have been the targets of reprisal by the leaders of the Haitian coup and whether those in fear of political persecution can freely seek political asylum at the U.S. Embassy.

From the time the first wave of boat people began leaving Haiti in late October, FAIR has supported the policy of processing Haitians seeking political asylum in the United States at Guantanamo Naval Base, Cuba, and repatriating those who were not fleeing political persecution. However, when the administration began its new policy on May 24 of interdiction and direct return of boat people, FAIR felt an obligation to conduct its own fact-finding mission to determine whether people with legitimate asylum claims were being given ample opportunity to press those claims.

II. A Political History of Haiti

Haiti has been an independent nation since 1804, when a slave rebellion expelled the French colonists. In the ensuing 188 years, the country has enjoyed seven months of democracy (from February to September 1991). With the exception of the democratic election of Jean Bertrand Aristide in late 1990, every transition of power in Haiti has come at the point of a gun.

Throughout its history, Haiti has been a classic plutocracy in which a tiny elite, backed by a fractionalized and poorly organized military and police force have maintained political and economic control of the island. Most Haitians live in abject poverty, are illiterate and display an animistic fatalism toward life. With the brief exception of the Aristide regime, there has been little political will or organization among the peasants to challenge the plutocratic order.

Aristide was and remains an anathema to the Haitian power elite. His power base is composed of Haitian peasants, some intellectuals and university students. These peo-

ple make up the vast majority of the Haitian population. The elites, with the support of traditional military factions (numbering about 7,000 men), deposed Aristide to ensure their continued control of Haiti.

The military junta which seized control from Aristide on September 30, 1991, is still in the process of consolidating its power and seeking international recognition as the legitimate government of Haiti. On June 19, 1992, the Haitian legislature installed Marc Bazin as Prime Minister of the country in an attempt to create a civilian front for the military regime. Bazin himself is a long-time political rival of Aristide who was soundly defeated in the 1990 election. According to one election monitor, Aristide captured 67 percent of the vote in Haiti's only democratic election, to just 13 percent for Bazin.

In speaking with representatives of the United States Government, the OAS and other organizations, it is evident that a government controlled by Bazin as Prime Minister and Aristide as a titular president with little actual authority, would be an acceptable arrangement to most of the international community. Clearly, such an arrangement would have the enthusiastic support of Haiti's elite. However, there is overwhelming sentiment among the Haitian masses that the only acceptable resolution would be the unconditional restoration of Aristide to the presidency.

III. The Repatriation Process

Since the coup that ousted Haiti's first democratically-elected President Jean Bertrand Aristide on September 30, the United States Government has processed 37,997 Haitians who have sought political asylum in the United States. Of these, 11,119 have been approved for asylum and 9,007 have already been admitted. 23,420 people have been processed at the U.S. naval base at Guantanamo, Cuba, and been determined not to be political refugees. An additional 704 individuals returned to Haiti voluntarily and 2,887 have

been returned directly to Haiti since the United States instituted a policy of intervention and direct repatriation on May 24, 1992. (A small number of individuals find themselves in a state of limbo on Guantanamo, primarily due to HIV infection.)

The FAIR team had the opportunity to witness two repatriations of about 500 Haitians being returned from Guantanamo on June 17 and 19. Upon arrival at Port-au-Prince, the returnees are first issued new identity cards by Haitian immigration authorities. The people issuing the documents (four, on the days we observed) are in civilian dress. In addition, two armed, uniformed military officers were present in the repatriation area.

The interviews with the Haitian immigration authorities were brief and routine. Each returnee was asked their name, where and when they were born and where they currently resided. The Haitian authorities did not ask the repatriates why they had left. Upon completion of the questioning, each person was issued a new identity document. During our two days of observation we did not witness anyone being finger printed or photographed by the Haitian authorities. However, according to Audrey Dumentat, a Consular Officer with the U.S. Embassy in Port-au-Prince, random finger printing does occasionally occur.¹

After being processed by the Haitian authorities, the returnees were then turned over to the Red Cross. Each person is given the equivalent of \$15 in cash to cover the cost of transportation to their home villages. They are also issued Red Cross ration cards for a 45-day food supplement.² The Red Cross then transports each repatriate to

¹ The finger printing is strictly for intimidation and harassment value. The Haitian government does not have the capability to match the finger prints in their files.

² The first wave of people repatriated from Guantanamo received this supplementary assistance. However, according to Red Cross field work-

the Port-au-Prince bus depot where each individual is responsible for making their own arrangements for transportation home.

Each repatriation is observed by representatives of the U.S. State Department, USAID, the U.S. Coast Guard, and the International Red Cross. Independent observers, such as ourselves, are given free access to the entire process. We were never impeded by U.S. authorities, Haitian authorities or the by the Red Cross from watching or listening to any part of the process. We were also free to photograph whatever and whenever we wanted. We also had an opportunity to speak with any of the repatriates at any time. None appeared frightened or intimidated to talk with us, despite the presence of uniformed and non-uniformed Haitian officials.

It is clearly evident to any observer that the repatriation process itself does not lead to any subsequent persecution of the returnees. The Haitian authorities present at the Port-au-Prince repatriation site are little more than bureaucrats going through the motions of doing their jobs. According to other reliable international observers, they occasionally engage in random intimidation of returnees, much as they engage in random intimidation of average citizens and even foreigners, but they do not have the organizational capability for systematic retribution.

IV. Opportunities for "In-Country" Application for Asylum

The policy instituted on May 24 requires all Haitians wishing to seek political asylum in the United States to make their application in Haiti, rather than taking to the sea

ers, no food has been received since early April and the returnees are unaware of this until they seek assistance. The Haitian Red Cross as well as International Red Cross are aware of this problem, nevertheless, they continue to issue ration cards without informing the recipients of these conditions.

and making their claims at Guantanamo or aboard Coast Guard cutters. One of the primary purposes of our mission to Haiti was to determine whether in-country applications for political asylum were feasible given the political situation on the island. We attempted to determine whether Haitians were aware that they could request asylum in-country and whether they could do so without putting themselves at risk.

Leslie Alexander, the Deputy Chief of Mission at the U.S. Embassy in Port-au-Prince (and the highest ranking official in the absence of Ambassador Al Adams) informed us that there has been a concerted effort to make Haitians aware of opportunities to request asylum in-country. These efforts have included advertising on popular radio stations in Haiti as well as bulletins on the Creole language service of Voice of America. In addition, embassy personnel have also spread the word as they move about the island.

Haitians wishing to apply for political asylum can do so in a number of ways. The radio ads supply phone numbers for people to call to set up appointments for an asylum hearing. These hearings may be held at the embassy in Port-au-Prince, or at some other designated location. According to Alexander, in certain cases, the embassy will even send teams to an applicant's home village if necessary.

Applications can also be made in person at the embassy. Access to the U.S. Embassy is unimpeded and there are no apparent signs that Haitian authorities are keeping tabs on who enters and leaves the embassy. This conclusion is the result of personal observation, discussion with embassy personnel and conversations with private Haitian citizens. Two Haitian students whom we met on the streets of Port-au-Prince and who served as guides on a walking tour of the city both indicated that they would not be concerned about entering the U.S. Embassy.³

³ Unlike conditions in the old Soviet-bloc, Haitians are not worried

In-country application for refugee status is essential to controlling further outflows of migrants from Haiti. Since the ouster of Aristide, the country has been gripped by a sense of despair. In such an atmosphere, even the prospect of making it to Guantanamo had become a magnet drawing additional migrants. With approximately one-third of the migrants at Guantanamo being given permission to go to the United States, these odds have encouraged many desperate Haitians to risk their lives on the treacherous seas.

V. Condition of Repatriated Haitians

During our week in Haiti, we had the opportunity to conduct extensive interviews with about a dozen people who had been on Guantanamo and were returned home. These interviews were conducted either directly with repatriates who spoke English or French, or through interpreters (that we hired) for those who spoke only Creole. In addition to speaking to the returnees, we also spoke with representatives of human rights organizations such as the International Red Cross, Americas Watch and Catholic Relief Services.

In our interviews with the repatriated Haitians we attempted to learn the following:

- a. Why they left Haiti in the first place;
- b. The substance of the claims they made to U.S. officials on Guantanamo; and
- c. Whether they had been singled out for persecution or retribution after returning to Haiti.

The reason why there has been an attempted mass exodus from Haiti is self-evident: The vast majority of people in

about the consequences of speaking frankly and being seen openly with foreigners. There is no indication that they are being observed or that they will later be questioned by Haitian authorities.

that country live in abject poverty. Without exception, every person we spoke with told us that their motivation for attempting to migrate to the United States was economic, not political.

There is an atmosphere of despair in the country that has intensified since the ouster of President Aristide who provided millions of impoverished Haitians with some modest hope for a better future. Without exception, every returnee we spoke with told us that they wanted to come to the United States to seek economic opportunity. This feeling of despair was also conveyed to us by better educated Haitians who have not attempted to leave Haiti.

The story of Camille (an alias) is typical of the people we spoke with. We found Camille with the assistance of Guy Dejean, the Red Cross representative in the coastal town of Gonaives where approximately 200 people have been returned. Camille attempted to migrate to the United States in November, was picked up by the U.S. Coast Guard, held on Guantanamo and returned to Haiti in February. A woman in her mid-twenties, Camille was the mother of five children (a sixth was born on Guantanamo) whose husband is ill and cannot find steady work. She hoped to make it to Florida and find a job as a house cleaner and send money back to support her family. When asked if this is what she told immigration officers at Guantanamo, Camille indicated that it was.

Similar stories were told to us by other returnees in Gonaives as well as by the people we spoke to at the repatriation center in Port-au-Prince. No one we spoke with told us that they had left Haiti for fear of political persecution.⁴ None of the returnees we spoke with were fear-

⁴ Only one individual refused to tell us his reasons for leaving Haiti. A 16-year-old boy claimed to have left for reasons other than economic, but declined to specify what those reasons were. He simply asserted that his sister, who is several years older, was admitted to the U.S., but that he was denied admission because he is a minor.

ful that they would become targets of retribution for having left.

Our second objective was to determine whether people who have been repatriated have been persecuted by the government since returning. What we discovered is that there is no retribution directed from the leaders of the military government in Port-au-Prince, but that returnees are often harassed and intimidated by local police and militia in the provinces.

The disorganization of the central government would preclude any sort of systematic campaign of retribution, even if they were inclined to carry one out. In Haiti, each military commander and police chief is pretty much free to act on his own. This often means harassment and intimidation of repatriated boat people and others. Camille and others in Gonaives claim (convincingly) that verbal threats have been made against them by local militia, but none has been carried out.

Guy Dejean, who deals with all the returnees in Gonaives, was not aware of a single individual who has been jailed or murdered after repatriation. Arlen Hunsberger, the temporary representative of the Organization of American States in Haiti stated, "I can't imagine the Haitian government would be that organized." Finally, the U.S. Embassy in Port-au-Prince has sent teams of investigators around the country to follow up on the conditions of people who have been returned. To date, they have contacted 3,200 repatriates and have not found a single individual who has been jailed, harmed or murdered since returning.

Repression by military and police officials is a fact of life in Haiti. While there is no reason to disbelieve the claims of returnees that they are harassed by local military and police, it is also true that many others (including us), who

did not attempt to emigrate, are also subjected to harassment.

VI. The Effects of the OAS Embargo

The embargo which was put in place shortly after the September 30 coup has not caused any acute hardship for those who were behind the overthrow of Aristide. All imported goods are readily available, although they have become more expensive. The fancy restaurants are packed with affluent Haitians, the supermarkets are stocked with fresh produce, while poor Haitians go hungry and drink untreated water. The streets are jammed with BMWs and Range Rovers, while the rest of the population moves about in dangerously overcrowded vans, pick-ups and buses.

The most damaging effect of the embargo has been the drastic reduction in humanitarian aid. Food and medical assistance continue, though to a reduced degree. Other urgently needed humanitarian programs, however, have been halted, most notably agricultural assistance and reforestation programs. Thus, those programs intended to help Haitian peasants develop and maintain a subsistence existence have been ended, while the rich have been merely inconvenienced.

There is widespread agreement in Haiti that continuation of the embargo is necessary because it denies legitimacy to the military government. But there is also a pervasive belief that the embargo must be tightened to punish those who have benefitted from the coup, while programs that are essential to the Haitian masses be restored. The conditions of the OAS-sponsored embargo are routinely violated by many OAS member nations themselves, while the European Economic Community and the Japanese have refused to honor it at all.

Unless the embargo is tightened and essential humanitarian aid restored, the political benefits of withholding legitimacy from the military regime will be far outweighed

by the additional suffering it is causing to the vast majority of the Haitian people.

VII. Environmental Degradation

Since Haiti has few natural resources besides its land, people and surrounding seas, the question of agricultural productivity and a sound environmental policy are key to the country's future development and welfare.

The island has completely lost its natural, closed canopy forests, save two small plots of land on the tops of mountains in the south of the country. The deforestation has occurred mostly in the last 20 years. But the loss of the trees was not the only tragedy. The topsoil, which is exposed to intense sunshine nearly every day of the year, has severely eroded and washed out to sea. In the south of the country, where rainfall is more abundant, massive landslides have become commonplace.

The nearby seas are not in much better condition. Overfished and damaged by the silt from the island's run-off, the once productive coral reefs have been severely damaged and their recovery is in doubt.

The mountainous nature of the country coupled with its spotty rainfall has made agriculture, Haiti's biggest employer, a tough occupation indeed. Water projects have been devised for the rice producing areas north of Port-au-Prince, but most of the country relies on natural rainfall or groundwater irrigation. The northwestern part of the country, which receives the least amount of rainfall, has been largely desertified, with several forms of cacti and sagebrush dominating the landscape.

While this vegetation is natural on southern-facing mountain slopes in the tropics, the extent and location of the desertification is certainly due to the wholesale and rapid removal of the naturally occurring forests, which shaded the ground and retarded water loss. Once the canopy was

removed, the micro-climate was drastically altered by the rapid loss of ground moisture, and desertification began.

Cactus grows so well on the hard-baked soil of some regions of the country that it is used as natural fencing for livestock. Livestock is mostly goats, with some small scale cattle production.

Food crops are grown mostly in the south and in the mountains outside Port-au-Prince, away from the coast and the heavily populated areas. Rainfall here is more abundant and has allowed the development of low-lying, natural ground cover. Because of the mountainous nature of the country, temperate climate crops including potatoes and cabbage can be grown in the higher elevations while tropical crops such as mango, melons, rice and bananas can be grown in the lower elevations.

Officials at USAID report success with getting local farmers to plant trees in an effort to save the remaining topsoil and provide natural cooling for their dwellings. In fact, several million trees have been planted in the last decade, but their demise is all too evident after a quick stroll through the marketplace in Port-au-Prince. Most trees are cut down before they reach three inches in diameter and made into charcoal, the country's chief source of fuel for cooking.

With intensive international investment and domestic co-operation and participation, Haiti could regain much of its lost agricultural potential. Many of its mountains could eventually be reforested or terraced, allowing intensive food production and major reductions in soil loss. Unfortunately, this type of monumental, international effort is usually prefaced on internal political stability which is the cornerstone of any developmental project. Political stability is surely the premier task facing the nation.

VIII. The Politics and Economics Behind the Boatlifts

Boatlifts do not happen spontaneously. Masses of people do not suddenly hop in small boats and attempt to sail 600 miles across treacherous seas. Large scale movements of people of the type we have witnessed since the coup in Haiti are organized events which take advantage of people's desires to emigrate. Boatlifts are organized by people who have a political or an economic stake in them. This has certainly been true in Haiti.

Haiti, by the admission of most Haitians, is an unimportant country. What happens in Haiti is unlikely to attract more than fleeting attention from most of the rest of the world. A military coup in Haiti, in itself, would ordinarily soon be forgotten by the outside world preoccupied with other crises in other areas of the globe. According to most knowledgeable observers of Haitian politics, this is precisely what the leaders of the coup were counting on. Were it not for the boat people, the Haitian coup would almost certainly have faded from international consciousness within a matter of weeks, if not days.

From the standpoint of the perpetrators of the coup, the one thing that could challenge their usurpation of power would be some form of military intervention from the outside, namely the United States. And the only thing that might inspire American military intervention (particularly in the post-Cold War era) would be a large-scale refugee problem that the United States would be forced to deal with. Thus, the leaders of the coup would have an incentive to limit the kind of activities that might cause large numbers of people to attempt to flee the country. A centrally directed reign of terror, though certainly not something the Haitian military would shy away from, is clearly not in their interest at this time. Rather, it is likely that the junta would direct their attention toward the Aristide inner circle, not terrorizing the general population.

Politically, those with the most to gain from mass emigration, are those with an interest in seeing the Haitian situation remain a focus of world attention, namely the supporters of Aristide. Without coming right out and saying it, many of the political observers we spoke with in Haiti implied that some of the more recent waves of boat people have been encouraged by Aristide supporters. If that is true, then the Aristide supporters have succeeded splendidly in achieving their objectives.

The boatlifts have also been an economic boon to a handful of enterprising entrepreneurs in Haiti. There seems little doubt that the emigration was quickly turned into a profitable commercial enterprise by the small, wealthy, elite that controls most of the commerce on the island. A boat building industry was financed and sprung up almost overnight, while agents went into villages all around the country spreading rumors that the United States was prepared to admit asylum-seekers and encouraging people to buy a passage to the promised land. Several of the returnees we spoke with said they had been led to believe by those operating the boatlift that there was a window of opportunity for admission to the United States. Sadly, nearly all the people we spoke with liquidated their meager assets and borrowed from family and friends to pay their passage to America.

IX. Recommendations

At a United Nations conference on international migration, May 6-8, 1992, in Geneva, Switzerland, Sadaka Ogata, the U.N. High Commissioner for Refugees issued a dire warning that has ramifications with respect to the current situation in Haiti. Mrs. Ogata stated:

Under circumstances where most regular migration channels to the industrialized world have been closed, refugee status has been increasingly perceived as a way of circumventing immigration restrictions. As a result, the distinction between

refugees and migrants has become increasingly blurred both in the public mind and on the political agenda. The institution of asylum has come under serious pressure and may be gravely undermined.

Haiti is a perfect example of the kind of blurring the High Commissioner foresees developing in many parts of the world. There is a symbiotic relationship between the poverty, political instability and political repression one finds in Haiti. People are poor because there is no political stability on the island, while the instability itself becomes a cause for still greater repression which further exacerbates the poverty. Haiti is not unique in this respect; it is merely one of the most advanced cases of the political and economic dysfunction that afflicts much of the Third World.

1. The United States should continue to interdict and return Haitian boats headed for Florida. A program of in-country screening of people requesting political asylum is feasible and can be carried out fairly without endangering those who apply and are denied. The experience gained over the past six months of bringing boat people first to Guantanamo indicates that such procedures have become magnets for additional mass exoduses. U.S. policy should be designed to ensure that those who are politically persecuted have an opportunity to make a claim for asylum, but should not encourage those fleeing poverty to seek asylum. Some of the resources that had been committed to maintaining detention facilities on Guantanamo should be redirected toward stepped-up refugee screening capabilities within Haiti.

2. Strengthen the economic embargo, while increasing humanitarian aid. The United States should actively encourage its OAS partners, members of the European Economic Community and the Japanese to honor the economic embargo against the illegitimate government now in power in Port-au-Prince. The embargo is being widely violated at

present, with the result being increased depravation for Haiti's poor and only mild inconvenience for those who instigated the coup. In addition, humanitarian and agricultural assistance which has been curtailed since the imposition of the embargo should be restored. In particular, USAID programs which have been frozen and the Peace Corps, which has been withdrawn entirely, should resume full activities directed at improving conditions for the Haitian masses. Attention and priority should be given to reforestation efforts, which is a necessary first step to renewing Haiti's agricultural capability.

3. Family planning and literacy programs. The powerlessness of the Haitian masses stems from its exploding population and near universal illiteracy. The objective of any foreign aid program should be to promote self-sufficiency of the population. Nothing would do more to further that objective in Haiti than family planning and basic literacy for Haitians.

4. Stepped-up human rights monitoring in Haiti. Given its current resources, the American Embassy in Port-au-Prince is doing all it possibly can to determine whether those who have been returned to Haiti are being singled out for persecution. To date, they have investigated the condition of some 3,200 repatriates. This will need to be an ongoing process and a continued priority of our government. The fact that there is currently no systematic campaign of retribution against returned boat people is no guarantee that there won't be one if the military junta believes there is no one watching. Effective monitoring of human rights in Haiti is an arduous and time-consuming task. Poor roads, poor or nonexistent telephone service in many parts of the country, and the lack of permanent addresses for much of the population, make a difficult job all the more difficult. There is no substitute for sending teams of investigators into the field so long as the current government remains in power.

METHODOLOGY

Three members of FAIR's senior program staff traveled to Haiti on June 15, and returned on June 19. The primary reasons for the trip were to investigate how the repatriated Haitians have been treated by the Haitian authorities and to determine how the in-country processing of asylum claims was working. The FAIR task force also wanted to look at the Haitian political situation, to determine the effects of the embargo and to evaluate the impact of the current crisis on the nutrition and health needs of the Haitian poor. Due to extensive deforestation and loss of topsoil throughout Haiti, the task force sought information on agricultural and environmental conditions and programs in Haiti; *particularly* whether conditions have deteriorated and programs have been curtailed due to the embargo and the narrow limits the OAS has placed on humanitarian aid.

To make full use of the task force's time in Haiti, the following contacts were made and meetings scheduled from Washington or on arrival in Port-au-Prince:

Douglas Hartley—a resident of D.C. and a former Foreign Service officer who worked recently under contract in the U.S. Embassy in Port-au-Prince. Douglas briefed a member of the FAIR staff on the conditions he found in Haiti and provided names of several of his key Haitian contacts who could provide information on the political situation and on the Haitian boat people.

Guy Mallary—a private Haitian lawyer and intellectual from a politically active family. He worked for Marc Bazin in the past and was jailed briefly due to his association with the new Prime Minister. Mallary outlined the repeating patterns in Haiti's political history, offered his analysis of the current crisis both from the side of the coup supporters/power elite and the Aristide supporters (primarily poor peasants), suggested possible solutions for

the current crisis and commented on repatriation, deforestation, etc.

Leslie Alexander—Deputy Chief of Mission, U.S. Embassy, Port-au-Prince. Mr. Alexander is the senior U.S. Embassy officer responsible for coordinating the administration's Haitian policies. He works with the State Department and local embassy staff to carry out the follow-up visits with repatriates to determine if any persecution has occurred; to set up consular/INS teams to travel in the countryside to conduct asylum interviews; and to establish a system for asylum interviews and processing asylum claims at the U.S. Consulate in Port-au-Prince. Mr. Alexander has also overseen the embassy's monitoring of the repatriations and its radio campaign to inform Haitians that they may make asylum claims at the U.S. Consulate. Also, Mr. Alexander has met with human rights monitors.

Audrey Dumentat—U.S. Vice Consul (and several other consular officials). Audrey and her colleagues monitor the repatriation process at the Port-au-Prince dock and are available for repatriates to approach with asylum requests.

Larry Harms—U.S. Agency for International Development (USAID) officer. He works with USAID agricultural and environmental programs and is qualified to report on past and current USAID activities in Haiti.

Amnesty International—An effort was made to contact an Amnesty International representative in Haiti. The organization does not have any personnel on assignment in Haiti but does send someone in occasionally. There was no representative there during our visit.

Larry Mizell—Coast Guard officer stationed in Port-au-Prince. He provided very general information about the Coast Guard mission in Haiti.

Arlen Hunsberger—temporary OAS representative in Haiti. He knows Haiti well due to a four year assignment there in the past. Arlen is knowledgeable about the embargo,

and its effects and the agricultural and environmental programs funded in the past with international aid.

Edward Chaivan—Director, Catholic Relief Services in Haiti (CARITAS). CARITAS programs are mainly in southern Haiti but Mr. Chaivan did give us the name and phone number of the CARITAS director in Gonaives, Father Gerard Dormville. We were unable to reach Father Gerard by phone.

Madame Virginia Ubik—Director, CARE, was contacted to get detailed information on conditions for repatriates and Haitian peasants in general. She was out of the country and the staff was not prepared to talk with the FAIR delegation.

International Red Cross—*Barbara Brook*—Canadian citizen and a member of the Red Cross staff in Port-au-Prince. Barbara monitors the repatriation process and is knowledgeable about Haitian Red Cross programs throughout Haiti, particularly the supplemental food programs for repatriated Haitians. She talked with the FAIR task force and put us in touch with Guy DeJean, Regional Director of the Haitian Red Cross in Gonaives.

Haitian Red Cross—*Guy Dejean*, Regional Director of the Haitian Red Cross in Gonaives, is responsible for distribution of food in his region to more than 200 repatriates. Guy is in touch regularly with the repatriated Haitians in his region and can report first-hand on how they were treated before and after their return.

Christian missionaries stationed in northwest Haiti—They were temporarily in Port-au-Prince and talked with the FAIR task force about the political, health and nutritional conditions in the northwest of the country. They have a feeding center for fifty Haitian children.

Chantal Joachim—Interpreter and romance language teacher at the University in Port-au-Prince. She is employed only part-time due to the embargo. She reported

on the problems university students and Haitian middle-class intellectuals are having with the government.

Gilbert Geroute—Interpreter and well educated intellectual. He is unemployed due to the embargo. He was very knowledgeable about the political scene and the behavioral patterns of both military and civilian supporters of the current and past Haitian governments.

Bernard Hilder—German radio correspondent.

The FAIR task force also spoke with the following:

Repatriates going through the repatriation process at the docks in Port-au-Prince—We asked them why they left Haiti and what their attitudes, fears and concerns were on their return.

Repatriates in the Region of Gonaives—We asked them why they left Haiti and how they had been treated by the authorities before their departure and since their return.

Haitian students—Three acted as informal guides for us in Port-au-Prince. We needed their assistance to walk around the city and we also wanted to see if they feared any retribution for publicly meeting with a group of foreigners seeking information.

Service personnel—informal interviews with a wide range of Haitians whom we came in contact with on a daily basis, including bartenders, hotel desk clerks, restaurant waiters, taxi drivers, etc.—We spoke with dozens of people in the service sector to learn of their political attitudes and knowledge of any type of persecution.

Cameron D. Whitman

Cameron Whitman is the field director for FAIR. She has extensive international experience living and working abroad. Cameron has served as a Peace Corps volunteer

working with the Quechua-speaking Indians to develop literacy and community development programs. She has also lived and worked in Yugoslavia and Italy with the U.S. Government and for private voluntary organizations (PVO's) and as a free lance consultant. Cameron has a B.A. in political science.

David Ray

Dave Ray has a Bachelor of Science degree in Agriculture and has worked as an agricultural economist for the Foreign Agriculture Service in Washington, D.C. He has lived and worked on several farms overseas and has a keen interest in horticulture. He was raised on a small farm in Ohio.

Ira Mehlman

Ira Mehlman has extensive experience as a journalist and has lived and worked in the Middle East. He has also served on the staff of an important congressional committee and as a Special Assistant to the Governor of Colorado. Ira holds a Bachelor's degree in Political Science and a Master's degree in Communications.